INDEX

Subject Index

Page

Brief Opposing Petition for Writ of Certiorari..... 1

1. No rights of petitioner under the Fifth Amendment are before the Court. Jurisdiction is invoked under 28 U. S. C. 1257 (3). This is upon the ground that the state statute in question is repugnant to the Constitution of the United States and that petitioner asserted reliance in the state court upon the Fifth Amendment of the United States Constitution, asserting that he was immune from prosecution, having testified before the public examiner and that unless such immunity was granted he was compelled to be a witness against himself 1

2. No rights of petitioner under Fourteenth amendment are before this Court because . 4

2.1 The Appellant's brief on appeal to the Minnesota Supreme Court did not cite the Fourteenth Amendment and no claim was made by appellant based thereon. After the decision of the Supreme Court of Minnesota was rendered, the petitioner herein moved the Court for reargument. The motion is not printed in the record..... 4

2.2 The Fourteenth Amendment Does Not Apply 8

Table of Cases Cited

Adamason v. *People of the State of California,* 332 U. S. 46, 50, 51, 67 S. Ct. 1672..... 3

Commercial Bank of Cincinnati v. *Buckingham's Executors,* 5 How. 316..... 8

Page

Congdon, et al. v. *Goodman, et al.*, 67 U. S. 574 9
Ensign v. *Pennsylvania*, 227 U. S. 592 2
Ferry v. *King County*, 141 U. S. 668, 12 S. Ct. 128, 35 L. ed. 895 10
Grand Gulf R.R. and Banking Co. v. *Marshall*, 12 How. 165, 13 L. ed. 938 9
Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 6
Herndon v. *Georgia*, 295 U. S. 443 7
Jack v. *Kansas*, 199 U. S. 372 2
Palko v. *Connecticut*, 302 U. S. 319 4
Radio Station WOW, Inc. et al. v. *Johnson*, 326 U. S. 120 8
Snell v. *Chicago*, 152 U. S. 191, 38 L. ed. 408, 14 S. C. 489 10
The American Surety Co. v. *Baldwin*, 287 U. S. 156 .. 6
Twining v. *New Jersey*, 211 U. S. 78 ..... 2, 4
Ward & Gow v. *Krinsky, et al.*, 259 U. S. 503, 42 S. Ct. 529, 66 L. ed. 1033, 28 A. L. R. 1207 10

CONSTITUTION AND STATUTES

U. S. Constitution:

Fifth Amendment 1, 2, 8
Fourteenth Amendment 3, 8

28 U. S. C. 1257 (3) 1
58 Am. Jur., Witnesses, § 36, P. 44 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 132

AUGUST H. GENSMER, JR.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

Under the provision of Rule 38 of this Court, Paragraph 3, Respondent, the State of Minnesota, makes the following statement disclosing matters and grounds against the jurisdiction of this Court asserted by the petitioner for a writ of certiorari:

1. No rights of petitioner under the Fifth Amendment are before the Court. Jurisdiction is invoked (Petition Page 3, B, 1) under 28 U. S. C. 1257 (3). This is upon the ground that the state statute in question is repugnant to the Constitution of the United States and that petitioner (Petition, Page 4, Par. 3) asserted reliance in the state court upon the Fifth Amendment of the United States Con-

stitution, asserting that he was immune from prosecution, having testified before the public examiner and that unless such immunity was granted he was compelled to be a witness against himself.

The decision of the Minnesota Supreme Court appears in the record, Page 152.

The errors assigned on appeal to the Minnesota Supreme Court involved the question on the Fifth Amendment (R. 154). This raised no question proper for the consideration of the Minnesota court.

Jack v. *Kansas*, 199 U. S. 372:

This Court is bound by the decisions of the highest court of the state that a state statute does not violate any of the provisions of the state constitution and is valid so far as that instrument is concerned.

The first ten Amendments to the Federal constitution operate on the National government only and were not intended to, and do not limit, the powers of the states in respect to their own people.

The provision in the Fifth Amendment to the Constitution of the United States that no person shall be compelled to be a witness against himself applies only to procedure of the United States courts. *Ensign* v. *Pennsylvania*, 227 U. S. 592.

> "• • • The Fifth Amendment is, of course, a limitation on the Federal power only, and has no application to proceedings under the authority of a state. • • •" *58 Am. Juris.*, Witnesses, Page 44, Sec. 36.

In *Twining* v. *New Jersey*, 211 U. S. 78, it was held that:

> "• • • Indeed, since by the unvarying decisions of this court the first ten Amendments of the Federal Constitution are restrictive only of National action, there was nowhere else to look up to the time of the adoption of the Fourteenth Amendment, and the State,

at least until then, might give, modify or withhold the privilege at its will."

The syllabus states:

"The judicial act of the highest court of a State in authoritatively construing and enforcing its laws is the act of the State.

"Exemption from compulsory self-incrimination in the state courts is not secured by any part of the Federal Constitution.

* * * * * * *

"The first eight Amendments are restrictive only of National action, and while the Fourteenth Amendment restrained and limited state action it did not take up and protect citizens of the States from action by the States as to all matters enumerated in the first eight Amendments.

* * * * * * *

"Exemption from compulsory self-incrimination did not form part of the 'law of the land' prior to the separation of the colonies from the mother-country, nor is it one of the fundamental rights, immunities and privileges of citizens of the United States, or an element of due process of law, within the meaning of the Federal Constitution or the Fourteenth Amendment thereto.

"The fact that exemption from compulsory self-incrimination is specifically enumerated in the guarantee of the Fifth Amendment tends to show that it was, and is to be, regarded as a separate right and not as an element of due process of law."

* * * * * * *

In *Adamson* v. *People of the State of California*, 332 U. S. 46, 50, 51, 67 S. Ct. 1672, it was held that the clause of the Fifth Amendment protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on ground that freedom from testimonial compulsion

has the right of national citizenship or because it is a personal privilege or immunity secured by Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

The concurring opinion of Mr. Justice Frankfurter calls attention to *Palko* v. *Connecticut*, 302 U. S. 319, and *Twining* v. *New Jersey*, 211 U. S. 78, as having settled the doctrine that the Fifth Amendment is not directed to the states. He says: (332 U. S. 60)

> "• • • After enjoying unquestioned prestige for forty years, the *Twining* case should not now be diluted, even unwittingly, either in its judicial philosophy or in its particulars. As the surest way of keeping the Twining case intact, I would affirm this case on its authority."

And this was a 1947 decision.

Without commenting in detail on the quite exhaustive dissenting opinion of Mr. Justice Black, in *Adamson* v. *People of the State of California*, it is significant in this that the Supreme Court of the United States has considered and determined this question after due deliberation and considering all phases of the subject, so that the majority decision must be taken by the people to be the law and it is not open to us, and it cannot be said that this case is not decisive on the case now before the court.

Accordingly, it appears to the respondent that for lack of jurisdiction, no question on the Fifth Amendment is now before this Court.

2. No rights of petitioner under Fourteenth Amendment are before this Court because

2.1 (Although the printed record does not show the briefs in the Minnesota Supreme Court) the Appellant's brief on appeal to the Minnesota Supreme Court did not cite the Fourteenth Amendment and no claim was made by appel-

lant based thereon. After the decision of the Supreme Court of Minnesota was rendered (R. 152), the petitioner herein moved the Court for reargument. The motion is not printed in the record. It stated as grounds among others:

> "8. Counsel for appellant inadvertently failed to submit to the Court for consideration the proposition of law that immunity should be granted because the defendant is entitled to the protection afforded by the Fourteenth Amendment to the Federal Constitution."

As stated in the petition now before the Court (P. 4) "the petition (motion) was denied."

No evidence of inadvertence of counsel appears in the record before this Court. No such evidence was submitted to the Minnesota Court and the mere mention thereof in a motion, unsupported by any proof, presented nothing to the Minnesota court for consideration. At most, it was discretionary with the court whether a rehearing should be had if there had been evidence of inadvertence. The Court having denied the motion, the question of state practice, whether the discretionary order was proper, is not before this Court for review.

Petitioner sought, on such motion after decision, to inject into the appeal a new subject not disclosed by the assignments of error, not argued or presented to the Court before decision, and there can be no question that the Court in regulating its own procedure had the discretion to refuse to hear a new question on reargument. There being no evidence of inadvertence, the court certainly could deny the petition for reargument.

The right to a reargument in the state court is not a right assured to the petitioner under the Constitution of the United States and hence any error arising from the order denying the motion is not to be reviewed here.

In *The American Surety Company* v. *Baldwin*, 287 U. S. 156, Mr. Justice Brandeis said at page 163:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. Compare Corkran Oil Co. v. Arnaudet, 199 U. S. 182, 193; Godchaux Co. v. Estopinal, 251 U. S. 179, 181; Live Oak Water Users' Assn. v. Railroad Comm., 269 U. S. 354, 357."

Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, on Page 366, Mr. Justice Cardozo said:

> "• • • The first mention of the Fourteenth Amendment to be found in the record is in the petition for rehearing, where also there is a statement that the constitutional question was presented on the first hearing of the appeal and is now renewed and amplified. The answer to the petition for rehearing by counsel for the respondent is also in the record and contains what is in substance an admission that the constitutional point had been duly made at the time and in the manner stated by the moving party. The court in denying the application did so by reference to its opinion on a similar motion in a companion suit decided at the same time (Montana Horse Products Co. v. Great Northern Ry. Co., supra), and nowhere in that opinion did it

contest the statement of counsel that the effect of the Fourteenth Amendment had been argued at every stage. We have then in the record what is in essence the stipulation of counsel followed by the acquiescence of the court. Whether this without more avoids the application of the general rule that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing (American Surety Co. v. Baldwin, ante, p. 156; Godchaux Co. v. Estopinal, 251 U. S. 179), we are not required to determine, for here there is more, and that enough to bring the case within a well-recognized exception. The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided (Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co., 228 U. S. 326, 334; Cumberland Coal Co. v. Board, 284 U. S. 23), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 678; Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U. S. 313, 320; American Surety Co. v. Baldwin, supra."

In *Herndon* v. *Georgia*, 295 U. S. 443, this Court said:

"The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. Texas & Pacific Ry. Co. v. Southern Pacific Co., 137 U. S. 48, 54; Loeber v. Schroeder, 149 U. S. 580, 585; Godchaux Co. v. Estopinal, 251 U. S. 179, 181; Rooker v. Fidelity Trust Co., 261 U. S. 114, 117; Tidal Oil Co. v. Flanagan, 263 U. S. 444, 454-455, and cases cited."

In *Radio Station WOW, Inc. et al.* v. *Johnson*, 326 U. S. 120, on Page 128, the Court speaking through Mr. Justice Frankfurter said:

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised to the original disposition. Simmerman v. Nebraska, 116 U. S. 54; Godchaux Co. v. Estopinal, 251 U. S. 179; American Surety Co. v. Baldwin, 287 U. S. 156."

2.2 The Fourteenth Amendment Does Not Apply.

Without waiving point 2.1, we urge that no right of the petitioner under the Fourteenth Amendment has been infringed.

The Due Process clause of the Fourteenth Amendment does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in a state trial that is secured to him against Federal interference by the Fifth Amendment.

Petitioner sought on such motion after decision to inject into the appeal a new subject not included in the assignment of error, not argued or presented to the Court before decision and there can be no question that the court in regulation of its procedure had the discretion to refuse to hear a new question on reargument.

The privilege against self-incrimination is not part of the right to fair trial protected by the "due process" clause of the Fourteenth Amendment. *Adamson* v. *People of the State of California, supra; Palko* v. *Connecticut, supra.*

In *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 Howard 316, it was held that to bring a case to this Court, from the highest court of a state, under the 25th section of the judiciary act, it must appear on the face

of the record that the question was decided in the State Court, as required in the section.

It is further held that it is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and that this claim was overruled by the court, but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment.

Congdon, et al. v. *Goodman, et al.*, 67 U. S. 574, held that a controversy in which no right is claimed under the Constitution or laws of the United States, but which turns entirely upon the validity or interpretation of State laws, is exclusively within the jurisdiction of the State Court, and this Court has no appellate power over its judgment.

The *Grand Gulf RR. and Banking Co.* v. *Marshall*, 12 Howard 165, 13 L. Ed. 938, held that in order to bring a case within the reviewing power of this Court, as prescribed by the 25th section of the judiciary act, it is necessary that the record should show that the point giving jurisdiction to this Court was raised and decided by the state court. Hence, where it appears from the record that the decision of the state court turned upon a construction and not upon the validity of the state law, and that the question of validity is not raised, this Court has no jurisdiction.

The reason for the rule is well stated by Mr. Chief Justice Taney (12 Howard 167):

> "• • • The party is authorized to bring his case before this court, because the State court has refused to him a right to which he is entitled under the Constitution or laws of the United States. But if he omits to claim it in the State court there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for anything that appears

in the record the judgment of the State court might have been in his favor if its attention had been drawn to the question. * * *"

In *Snell* v. *Chicago*, 152 U. S. 191, 38 L. Ed. 408, 14 S. Ct. 489, Mr. Justice Brewer said in the opinion (152 U. S. 196):

"Guided by the rule thus laid down and long established, we turn to the record, including therein the opinion of the Supreme Court of the state, to see what in fact was decided. From such inspection it is obvious that there was no decision adverse to the rights vested in the Northwestern Plank-Road Company by its charter. * * *"

So we look to the opinion in the *Gensmer* case, decided by the Supreme Court of Minnesota, to see what the court decided.

Ferry v. *King County*, 141 U. S. 668, 12 S. Ct. 128, 35 L. Ed. 895, holds that the validity of a statute is not drawn in question every time that rights claimed under it are controverted; nor is the validity of an authority every time an act done by such authority is disputed.

Ward & Gow v. *Krinsky, et al.*, 259 U. S. 503, 42 S. Ct. 529, 66 L. Ed. 1033, 28 A. L. R. 1207, states in the opinion: (259 U. S. 510)

"In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence for present purposes it must be taken as settled that the legislature intended the compensation law as amended to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the Fourteenth Amendment upon state action."

So it appears that this Court is not concerned with the decision of the Minnesota Supreme Court in respect to the statute under which the public examiner derives his powers and functions. It is not claimed that the legislature in Minnesota had no right to enact that statute. The validity of the law is not questioned. It is only its construction of which the appellant complains. The validity being conceded, the construction of the state statute by the Minnesota Supreme Court was final.

The petition, pages 5 and 6, specifies questions 2, 3, 4, 5 and 6, none of which involve the Constitution or the Statute of the United States, all of which involved the state court's construction of Minnesota statutes and not the validity thereof.

WHEREFORE, the Respondent respectfully submits this brief showing that the questions upon which the decision of the above entitled cause depends are so unsubstantial as not to need further argument and respectfully requests the Court to deny the petition for certiorari.

CHARLES E. HOUSTON,
Assistant Attorney General,
State of Minnesota,
Attorney for Respondent.

J. A. A. BURNQUIST,
Attorney General of Minnesota;
GEORGE B. SJOSELIUS,
Deputy Attorney General of Minnesota;
W. KENNETH NISSEN,
County Attorney, Winona County,
Winona, Minnesota,
Of Counsel for Respondent.